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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC., ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of Circuit Judge Tamm and Circuit Judge Fahy of the United States Court of Appeals (A19) are reported, *Red Lion Broadcasting Co., Inc., et al.* v. *Federal Communications Commission, et al.*, U.S. App. D.C. , 381 F.2d 908.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 13, 1967. The petition for certiorari was filed September 11, 1967 and granted December 4, 1967.

The jurisdiction of this Court is invoked under 28 USC 1254(1) and 5 USC 1040. The jurisdiction of the Circuit Court of Appeals was invoked under the provisions of Sec. 402(a) of the Federal Communications Act of 1934 as amended, 47 USC 402(b), and 5 USC 1009(c), 1009(e), and 5 USC 1032.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutes

COMMUNICATIONS ACT OF 1934, AS AMENDED.

Sections 303(g), 315(a), 326;
47 USC 303(g), 315(a), 326

Section 303. Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 315. Candidates for public office; facilities; rules

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. *Appearance by a legally qualified candidate on any—*

(1) *bona fide newscast,*

(2) *bona fide news interview,*

(3) *bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary),* or

(4) *on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),*

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[1]

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[1] Portion in italics added by amendment approved September 14, 1959, Public Law 86-274; 73 Stat. 557.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 326. Censorship.

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Regulations

Federal Communications Commission Public Notice, July 26, 1963, FCC 63-734; 25 P & F Radio Reg. 1899 (1963)

(A) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response. (Clayton W. Mapoles, 23 Pike & Fischer RR 586, 591; Billings Broadcasting Company, 23 Pike & Fischer RR 951, 953).

QUESTION PRESENTED FOR REVIEW

Whether the First Amendment rights of the petitioners, owners and operators of a radio broadcasting station, are abridged by an order of the Federal Communications Commission, pursuant to the Commission's

"personal attack" doctrine, requiring the petitioners, in the case of a person who during a broadcast over the petitioners' station is the subject of a "personal attack", as defined by the Commission, to furnish to such person a tape recording, transcript or summary of the attack, and thereafter to offer him without charge comparable time in which to respond; these obligations being imposed upon the petitioners irrespective of the truth or falsity of the statements contained in the attack, and without regard to the fact that the petitioners may have broadcast them in good faith, believing them to be true.

STATEMENT OF THE CASE

The petitioners are Red Lion Broadcasting Co., Inc., the licensee of Radio Station WGCB-AM-FM, at Red Lion, Pennsylvania, and the Reverend John M. Norris, the principal stockholder and president of Red Lion Broadcasting Co., Inc. (A5) They petitioned the United States Court of Appeals for the District of Columbia Circuit to review an order of the Federal Communications Commission, directing the petitioners to grant free time over petitioners' radio station to one Fred J. Cook, so that he might respond to a personal attack made on him over the facilities of these stations by one Reverend Billy James Hargis. The challenged order required petitioners to furnish Mr. Cook a transcript, recording or summary of the broadcast in question and to grant him free time even though he was financially able to pay for the time. (A5) The case was heard in the Circuit Court of Appeals before Senior Circuit Judge Wilbur K. Miller, and Circuit Judges Fahy and Tamm. The Court of Appeals affirmed the action of the Federal Communications Com-

mission. Circuit Judge Tamm filed an opinion. Circuit Judge Fahy filed a separate opinion concurring in the result. Senior Circuit Judge Miller did not participate in the consideraiton and decision of the case on the merits.[2]

In November 1964 petitioners broadcast a 15-minute program by Reverend Billy James Hargis as part of a series entitled *The Christian Crusade.* (A32, 37, 60) The program included a discussion of the 1964 Presidential election and of a book by Mr. Fred J. Cook about the Republican campaign, entitled "Goldwater—Extremist on the Right". (A37, 60, 93) As part of the broadcast Reverend Hargis made the following statements concerning Mr. Cook:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney, Frank Hogan." (A38)

The Hargis program was broadcast by a number of other stations located in various parts of the country.

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[2] The panel consisting of Judges Miller, Fahy and Tamm, with Judge Fahy dissenting, had previously concluded that the challenged rulings of the Commission were declaratory only, and not orders from which an appeal might be taken, and the panel accordingly dismissed petitioners' action. (A82, 86, 90) Thereafter a majority of the Court *en banc* voted to vacate the opinion and judgment filed by the panel and directed the assigned division to consider the petitioners' action upon the merits. (A90, 92) *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, decided May 22, 1967, has sustained the position of Judge Fahy and the majority of the Court on the jurisdictional point.

(A26-29) Thereafter Mr. Cook wrote to Station WGCB, quoting from the Hargis broadcast, and stating:

> "* * * *
>
> "The purpose of this inquiry is two-fold:
>
> "(A) Since your station is listed as one of those that has carried the Rev. Billy James Hargis' Christian Crusade broadcasts, did you in fact put on the air this attack against me made by the Rev. Billy James Hargis? I expect an answer, yes or no.
>
> "(B) If you did, this is to serve notice that I shall expect you to grant me equal time, at your expense, as provided in FCC regulations, to answer in appropriate fashion this slanderous and libelous attack." (A33, 34)

In response petitioners furnished Mr. Cook with the WGCB rate card so that he could arrange for the time he might wish to purchase. Petitioners also sent Mr. Cook copies of letters which they had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union. (A34, 35) After a further exchange of letters between Mr. Cook and WGCB he filed a complaint with the Federal Communications Commission. In his complaint Mr. Cook charged that Station WGCB had broadcast a "personal attack" against him by Reverend Hargis, without notifying him of the attack or furnishing him with a transcript or summary either before or after the program was aired, and that the station had refused his request for free time to respond to the attack. (A37)

The Commission brought Mr. Cook's complaint to the attention of the petitioners and requested an answer

within twenty days. (A31) In their response the petitioners stated their understanding to be

> "* * * that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to 'sponsor' or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry.
>
> "The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to 'sponsor' or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. * * *" (A32, 33)

To these statements the Commission answered:

> "The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack '. . . on an individual's or group's honesty, character, integrity, or like personal qualities . . .' in connection with a controversial issue of public importance. See part E, Personal Attack Principle, 'Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance', 29 F.R. 10415, 10420-21. A copy of this document is enclosed.
>
> "Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate

a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid., The licensee may not delegate his responsibilities in this respect to others. Report on 'Living Should be Fun' Inquiry, 33 FCC 101, 107.

"In this case the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

"In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.,* FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and 'elemental fairness' not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. Cf. *Cullman Broadcasting Co., supra.*

"In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is

financially unable to sponsor or pay for his reply time.

"Accordingly, you are requested to advise the Commission of your plans to comply with the 'fairness doctrine', applicable to the situation." (A38, 40).

The petitioners requested the Commission to reconsider its ruling. They pointed out that prior to the Hargis broadcast Mr. Cook in a magazine article had attacked Mr. Hargis, his program, and his organization. The petitioners also requested "a ruling by the Commission on the constitutionality of the 'fairness doctrine' as applied to the instant situation." (A40-43). The Commission thereafter reaffirmed its ruling, stating in part (A44-49):

"* * *

"As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity

to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

"There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

"For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

"* * *"

In response to the petiitoners' request for a ruling as to the constitutionality of its "fairness doctrine" the Commission stated (A 48):

"* * *

"4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that dis-

cussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

"We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

"The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's 'honesty, character, integrity or like personal qualities.' See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid;* see also letter to Pennsylvania Community Antenna Association enclosed.

"A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broad-

casting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing*, 13 F.C.C. 1246-1270, par. 6.

"Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest 'in the larger and more effective use of radio' (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC v. United States*, 319 U.S. 190, 227." (A48, 49)

The Court of Appeals sustained the Commission's action, holding that it was authorized by the Communications Act, and in particular by Section 315(a), 47 USC 315(a), and did not violate the petitioners constitutional rights. (A 128-132)

SUMMARY OF ARGUMENT

Radio and radio broadcasters are included in the press whose freedom is guaranteed by the First Amendment. The fundamental purpose of the Amendment is to prevent previous restraints on publication, and, in particular, legal devices and doctrines which in their application have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. This Court has been strict and vigilant in striking down such devices and doctrines, which require a man to speak at his peril and to engage in self-censorship by making only bland statements that steer clear of an unlawful zone.

The ruling and order applied to the petitioners by the Commission constitute a doctrine and device offensive to these principles and to the First Amendment. The Commission has imposed upon the petitioners the burden of seeking out the subject of a "personal attack" broadcast over the petitioners' radio station, furnishing him a copy, recording or summary of the

offending broadcast, and thereafter providing him free time in which to respond. This burden is imposed on the petitioners, even though the statements contained in the broadcast may have been true or may have been made and broadcast in the good faith belief that they were true, so that the person who made the attack is immune from a suit for libel. In addition, the petitioners are subject to the imposition of sanctions by the Commission in the event they fail to comply with the Commission's order.

The Commission's order goes beyond a "previous restraint" on free speech. It dictates to the petitioners as to what the contents of a program shall be and who the speaker shall be. No matter how fairly and completely the petitioners in other programs and broadcasts may have presented the case for the subject of the "personal attack", they are told that he, and he alone, must be given time for a reply. This is precisely the "dictation as to what should go into particular programs" which Chafee accurately characterizes as "the sort of censorship which went on in the seventeenth century in England."

The ruling applied to the petitioners applies with equal force to radio commentators, news interview programs, and documentary programs. Such programs contain many statements which can be construed as "personal attacks" upon individuals or groups. To steer clear of the difficulties and expense resulting from "personal attacks" the participants in these programs will be constrained to confine their remarks to praise and platitudes.

The inhibitory force of the Commission's "personal attack" doctrine is enhanced by its vagueness. The definition of a "personal attack" as "an attack on an

individual's or group's honesty, character, integrity, or like personal qualities" is broad enough to include almost any criticism of an individual's actions or activities. This Court has condemned such broadly worded restrictions upon the ground that they offer no security for full discussion, blanket with uncertainty whatever may be said, and compel a speaker to hedge and trim.

The Commission and the Congress have recognized the inhibitory impact of a rule requiring broadcasters to grant free time. Thus, it was recognized in 1959 that "a blackout in the presentation of legally qualified candidates in the news-type programs" would result from a ruling by the Commission that a television station which used a brief newsclip of a candidate's activities was required to grant equivalent free time to all opposing candidates to use the station as they saw fit. To correct this interpretation of the Communications Act by the Commission the Congress amended the Act.

In summary, the inevitable result of the Commission's "personal attack" rule as applied to the petitioners will be that broadcasters will tread cautiously, staying as far as possible from the dangerous and ill-defined zone labeled "personal attack". In order to be safe, radio stations and broadcasters will be required to be bland and innocuous. The resulting self-censorship, imposed by the Commission, will be none the less virulent for having been self-administered. Such a regime is at war with the uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment.

The fact that as licensees the petitioners are subject to regulation does not justify the Commission in abridg-

ing the exercise of free speech over the petitioners' radio station. First Amendment rights may not be denied merely because they are tangled with conduct which the government may regulate. The Court has applied this principle in striking down, as abridgments of First Amendment rights, restrictions on conduct on the public streets and in public parks, and attempts to impose conditions upon the use of the mails.

The Commission cannot justify its "personal attack" rule by limiting its applicability to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities." Such a personal attack stands on no different footing, and is entitled to no lesser protection under the First Amendment, than any other speech.

In any event, the Commission has completely failed to demonstrate that there is any overriding or compelling public interest which requires the imposition of restraints or sanctions upon radio broadcasts of personal attacks. That the Commission thinks such regulation desirable and in the public interest is not conclusive. In many cases this Court has disagreed with similar judgments by state legislatures or municipal authorities.

The Commission is mistaken in its reliance upon statements in the opinion of Mr. Justice Frankfurter in *National Broadcasting Company* v. *United States,* 319 U.S. 190, 215, 216, 226, 227 (1943), which the Commission claims justify its "personal attack" rule. Read in context, these statements do not support any attempt to control the contents of programs or impose any previous conditions or restraint upon broadcasts; they mean only that the Commission may pass upon the

character of the persons participating in broadcasting and regulate their methods of competition.

The Commission is also mistaken in its reliance upon the fact that the number of broadcast frequencies is limited, from which fact the Commission apparently reasons that broadcasting facilities are also limited, and this being so the Commission may impose upon broadcasters conditions and restraints that would not be permissible in the case of newspapers. The Commission argues that such regulation of broadcasting is necessary in the public interest, to assure that programs are fair and balanced and present both sides of controversial issues. The petitioners submit that First Amendment rights may not be abridged, whether the number of broadcast stations be large or small. In any event the fact is that there are 6253 commercial radio and television stations in the United States, compared to only 1754 daily newspapers, a ratio of better than 3½ to 1. Diversity of speech and opinion on the air is therefore assured, without interference by the Commission.

If Section 315(a) of the Communications Act of 1934, 47 USC 315(a), as amended in 1959, or any other provision of the Act, purports to authorize the Commission's order, then for the reasons set out above the statute is *pro tanto* unconstitutional. However, contrary to the contention of the Commission in the court below, the history of the 1959 amendment to Section 315(a), as disclosed in committee reports, clearly demonstrates that the amendment was not intended to authorize, and did not authorize, the Commission's "personal attack" ruling, which was not promulgated until 1962.

ARGUMENT

The Ruling and Order of the Federal Communications Commission, as Applied to the Petitioners, Constituted an Abridgement of Freedom of Speech and of the Press in Violation of the Petitioners' First Amendment Rights

There can be no doubt that radio and radio broadcasters are included in the press whose freedom is guaranteed by the First Amendment. *United States* v. *Paramount Pictures,* 334 U.S. 131, 166 (1948); *Superior Films* v. *Department of Education,* 346 U.S. 587, 589 (1954).[3] As Chafee put it, speaking of the impact of the Amendment on the Federal Communications Commission

> "Specifically the First Amendment prevents the FCC from engaging in two kinds of activity. The first of these embraces what Congress had in mind when it forbade the Commission to exercise 'censorship' over radio communications. This means, I feel sure, the sort of censorship which went on in the seventeenth century in England—the deletion of specific items and dictation as to what should go into particular programs. Such supervision of details is in no way part of the Commission's job of allocating wave lengths. On the other hand, the statute does not forbid evaluation of the total performance of a station, which is an incidental feature of this job of parceling out the air." Chafee, Government & Mass Communications (1947), page 641 (footnote omitted)

The fundamental purpose of the First Amendment is to prevent previous restraints upon publication. *Near* v. *Minnesota,* 283 U.S. 697 (1931). "The free-

---

[3] Moreover, the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fifth Amendment. Cf. *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

dom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama,* 310 U.S. 88, 101, 102 (1940); *Roth* v. *United States,* 354 U.S. 476, 488 (1957). And this Court has on many occasions condemned, as previous restraints, "legal devices and doctrines" which in their application "have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith* v. *California,* 361 U.S. 147, 150, 151 (1959). The Court has been both strict and vigilant in striking down such devices and doctrines. As the Court said in *Smith* v. *California,* 361 U.S. 147, 151, 155

> "* * * And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. Winters v. New York, 333 US 507, 509, 510, 517, 518, * * *
>
> "We have said: 'The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' Roth v. United States, supra (354 US at 488). * * *."

Applying these principles the Court in *Smith* v. *California,* 361 U.S. 147 (1959), struck down an ordinance making it unlawful for a bookseller to have in his

store any obscene book, even though he was not aware of the contents of the book.

> "For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." 361 U.S. 153

Again in *Speiser* v. *Randall,* 357 U.S. 513 (1958), the Court held unconstitutional, as an abridgement of freedom of speech, a provision of the California Constitution which denied a tax exemption to one who declined to swear that he did not advocate the overthrow of the government of the United States or of the State by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities. The Court said:

> "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." 357 U.S. 518

Similarly, the Court held invalid an ordinance forbidding the distribution of any handbill which did not have printed thereon the name and address of the person who prepared, distributed or sponsored it. *Talley* v. *California,* 362 U.S. 60 (1960). The Court said (362 U.S. 64):

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."

Further safeguarding freedom of speech and of the press the Court held in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and *Curtis Publishing Company* v. *Butts,* 388 U.S. 130 (1967), that one who makes a personal attack upon a public figure is immune from a suit for damages for libel unless he speaks or writes with actual malice—that is with knowledge that his statement is false, or with reckless disregard of whether it is false or not. In so ruling the Court took into consideration the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan,* 376 U.S. 254, 270. Rejecting a rule compelling the critic of official conduct to prove the truth of his factual assertions, the Court held (376 U.S. 279) that such a rule would lead to "self-censorship", for "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser* v. *Randall, supra,* 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

When these principles are applied to the device and doctrine invoked by the Commission in its order to the petitioners it is apparent that the actions of the Commission are in violation of the First Amendment rights of the petitioners. The petitioners have been told by the

Commission that having carried on their radio station a program containing a "personal attack" on Mr. Cook they must seek him out, furnish him a copy, recording or summary of the broadcast and grant him free time for reply, irrespective of his ability to pay. This obligation is imposed upon the petitioners, even though the statements contained in the "personal attack" may have been true, (see opinion of Judge Tamm, A121, 381 F. 2d 925) or may have been broadcast in the good-faith belief that they were true. At the same time, under the rule of the *New York Times* and *Butts* cases, Mr. Hargis, who made the attack on Mr. Cook, is immune from a suit for damages for libel unless Mr. Cook can prove that the Hargis statements were false and were made with knowledge of their falsity or with reckless disregard of whether they were true or not.

Thus, the petitioners are subjected to a burden[4] or penalty, consisting of the expense involved in locating the subject of the personal attack, furnishing him with a script, recording or summary of the broadcast, and thereafter granting him free time in which to reply—time which otherwise might be allocated to a paying sponsor. Furthermore, and equally important and menacing, is the fact that failure to comply with the Commission's order may ultimately result in the im-

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[4] Judge Tamm in his opinion concedes that "* * * I readily agree that the compulsory granting of free time may, and probably does, impose a burden on the licensees. This burden, however, is not an unreasonable one." A124, 381 F.2d 926. Cf. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1449: "Not only does a 'balancing' first amendment fail to protect freedom of speech, but it becomes a mechanism for rationalizing and validating the kind of governmental action intended to be prohibited.

"Such are the consequences of distorting the amendment's thunderous 'Thou shalt not abridge' into a quavering 'Abridge if you must, but try to keep it reasonable' ".

position of sanctions against the petitioners by the Commission.[5]

Indeed, the Commission's ruling goes beyond a previous restriction; it dictates to the petitioners what the contents of a future program must be, and who the speaker must be. Even though the petitioners may have broadcast a full and fair presentation of conflicting views with respect to Mr. Cook, his activities and his writings, and Mr. Hargis and his program, this will not satisfy the Commission. The petitioners are ordered to permit Mr. Cook himself to reply to the attack on him. This we submit is precisely the "dictation as to what should go into particular programs" and "supervision of details" which Mr. Chafee accurately characterizes as "the sort of censorship which went on in the seventeenth century in England." (Chafee, Government and Mass Communications (1947), p. 641)

As Mr. Justice Frankfurter put it in his concurring opinion in *Smith* v. *California,* 361 U.S. 147, 161, 162 (1959), "* * * a case before this Court is not just a case. Inevitably its disposition carries implications and gives directions beyond its particular facts." We therefore briefly consider the implications of a decision sustaining the action of the Commission in this case.

The doctrine applied by the Commission in its ruling, as stated in its letter of October 6, 1965 to the petitioners, is (A38, 39):

> "* * * The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack.

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[5] By revocation of license (47 U.S.C. 312(a)), denial of application for renewal (47 U.S.C. 308, 309) and possibly by financial penalties (47 U.S.C. 503(b)).

> The latter is defined in our recent fairness primer as an attack '. . . on an individual's or group's honesty, character, integrity, or like personal qualities . . .' in connection with a controversial issue of public importance. See part E, Personal Attack Principle, 'Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance', 29 F.R. 10415, 10420-21. A copy of this document is enclosed.
>
> "Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on 'Living Should Be Fun' Inquiry, 33 FCC 101, 107."

As Columbia Broadcasting System, Inc., has pointed out in its brief and exhibits filed amicus curiae in support of the petition for certiorari, the ruling applied to the petitioners would apply with equal force to radio commentators, news interview programs, and documentary programs. Examples of such programs are Mr. Eric Sevareid's commentary, the news interview program, Face the Nation, conducted by Mr. Martin Agronsky, and the CBS news documentary programs, such as CBS Reports and CBS News Specials. Such programs must inevitably contain, and in fact do contain, many statements which can be construed as "personal attacks" upon individuals or groups.[6]

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[6] See Memorandum amicus curiae on behalf of the Columbia Broadcasting System, Inc., and pp. 23 et seq. of the brief for Columbia Broadcasting System, Inc., in No. 16,498, United States Court of Appeals for the Seventh Circuit, filed as an exhibit with this Court.

The chilling effect of the Commission's ruling on such commentators and programs is obvious. If Mr. Sevareid, for example, questions a politician's sincerity does this constitute an attack on that individual's "honesty, character, integrity or like personal qualities" and must every station carrying the Sevareid broadcast make available free time for him to reply?[7] If a guest on Face the Nation asserts that a public official has been responsible for a "credibility gap" must the network make free time available to the official in question? How much time must be offered in these cases? What other scheduled program or program material must be displaced or deleted to provide the necessary time? The pressure on commentators and broadcasters will be great, to steer clear of such questions and guard against the difficulties and expense resulting from a "personal attack", by confining their remarks to praise and platitudes.

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[7] Mr. James Reston in his column in the New York Times, Friday, December 22, 1967 notes that:

> "• • • when President Johnson said on his latest national TV broadcast that he 'didn't know what the effect of the Kennedy-McCarthy movement is having in the country' but that he did 'know of the interest of both of them in the Presidency and the ambition of both of them,' Senator Eugene McCarthy's campaign manager demanded that the three major TV networks give the Senator a half hour of free time on the ground that this was a 'personal attack' on the Senator. C.B.S. is saying no and for good reasons."

Mr. Reston comments:

> "What is 'an attack?' How do you define 'honesty, character, integrity or like personal qualities? Suppose Eric Sevaried, in a moment of reckless impetuosity, were to suggest one night that Jimmy Hoffa and Bobby Baker are men of dubious character, and Jimmy objects—is C.B.S. to set up a color camera in jail and let Mr. Hoffa proclaim his integrity to the nation?"

The inhibitory force of the Commission's "personal attack" doctrine is enhanced by its vagueness. What constitutes an attack "on an individual's or group's honesty, character, integrity or like personal qualities"? Among the relevant definitions of "character" contained in Webster's New World Dictionary (1957) are: "moral constitution; moral strength; self-discipline, fortitude, etc." Applying these definitions it would seem that almost any criticism of an individual's activities or actions might well be construed as an attack upon his "character". Furthermore, the Commission has expanded the boundaries of the dangerous ground almost to infinity by adding "like personal qualities" to the catalogue of personal traits which are covered by its doctrine.

The inhibitory effect on free speech of broadly worded restrictions is well illustrated by *Thomas* v. *Collins*, 323 U.S. 516 (1945). That case involved a Texas statute requiring a labor organizer to register and procure an organizer's card from a State official before "soliciting" persons to become members of a labor union. Holding the statute unconstitutional when applied to a speech by the president of a union, the Court said (323 U.S. 535):

> "Furthermore, whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of

whatever inference may be drawn as to his intent and meaning.

> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Keyishian v. *Board of Regents of New York*, 385 U.S. 589 (1967), is likewise instructive. In that case the Court struck down a New York plan requiring or authorizing the removal of members of the faculty of state institutions who were guilty of "treasonable" or "seditious" utterances or acts. The Court said (385 U.S. 589, 601):

> "* * * The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient in terrorem mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in 'those who believe the written law means what it says.'"

The Federal Communications Commission and the Congress have recognized the inhibitory impact of a rule requiring broadcasters to grant free time. In 1959 the Commission in the so-called *Lar Daly* case[8] held that Section 315(a) of the Communications Act of 1934 obliged a television station which used a brief newsclip of a candidate's activities—without the candidate's prior knowledge or consent—to provide equivalent free time to all opposing candidates to use the sta-

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[8] In the Matter of Petitions of Columbia Broadcasting System, Inc., and National Broadcasting Co., 26 FCC 715.

tion as they saw fit. Congress promptly overturned this ruling by amending Section 315(a). Public Law 86-274; 73 Stat. 557 (1959). In its report on the amendatory bill (S2424) the Senate Committee on Interstate and Foreign Commerce pointed out that the result of the Commission's ruling would be "a blackout in the presentation of legally qualified candidates in the news-type programs." The Committee stated:

> "Even the Federal Communications Commission recognizes that its present rigid interpretation of equal opportunity under Section 315 does constitute a deterrent to stations permitting the use of their facilities by legally qualified candidates. The inevitable consequence is that a broadcaster will be reluctant to show one political candidate in any news-type program lest he assume the burden of presenting a parade of aspirants." Senate Report No. 562, July 22, 1959.

In summary, the inevitable result of the Commission's "personal attack" ruling as applied to the petitioners will be that broadcasters will tread cautiously, staying as far as possible from the dangerous and ill-defined area labeled "personal attack". In order to be safe, radio stations and broadcasters will be required to be bland and innocuous, for if a mistake is made, and what the Commission construes as a "personal attack" is committed, the radio station, and every station carrying the broadcast, will be required to grant free time for a response, and perhaps to a parade of respondents.[9] The resulting self-censorship, imposed by the Commission, will be "hardly less virulent for

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[9] Cf. *Farmers Union* v. *WDAY*, 360 U.S. 525, 530 (1959): "Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution."

having been privately administered." *Smith* v. *California,* 361 U.S. 147, 154 (1959). Adopting the language of Mr. Justice Douglas in *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 (1965), we submit that such a regime "is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270."

The Grounds Upon Which the Commission Seeks To Justify Its "Personal Attack" Doctrine Are Untenable

The argument of the Commission in the Court below, which was accepted by the Court and presumably will be repeated here, was that

> "Radio broadcasters, * * * by utilizing the limited number of publicly-owned broadcast facilities and operating on a license valid for a limited period, carry on their programs as trustees for the public at large because of the Commission's determination that each licensee's operation will promote the public interest. The broadcasters, as public trustees, have an obligation in a democratic society to inform the beneficiaries of the trusteeship, id est, the public, of the different attitudes and viewpoints which are held by the various groups which make up the community. * * *" (Opinion of Judge Tamm, A127, 128; 381 F2d 928)

The Commission's reasoning is that being subject to regulation broadcasters as a corollary may be subjected to the "personal attack" rule. The argument, we submit, involves a non sequitur. While it is of course true that radio broadcasting is subject to governmental regulation (*National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943)) it does not follow that the right to regulate is unlimited, and surely it cannot be said

that regulation may abridge the exercise of freedom of speech and of the press by a radio station or broadcaster, by controlling or dictating the contents of programs, directly or indirectly, or by imposing previous restraints upon free speech over radio.

This Court is familiar with the argument that one who uses a public facility under a license subjects himself to regulations abridging his right of free speech. As Mr. Justice Jackson observed in his concurring opinion in *Thomas* v. *Collins,* 323 U.S. 516, 547 (1945):

> "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control."

The Court has consistently held, however, that "when the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistance is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control. *Cantwell* v. *Connecticut,* 310 U.S. 296, 311. Or as the Court said in *De Jonge* v. *Oregon,* 299 U.S. 353, 364, 365, when speaking of First Amendment rights, '. . . the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.'" Mr. Justice Douglas, dissenting in *United States* v. *International Union,* 352 U.S. 567, 596 (1957). Thus in the *Cantwell* case the Court struck down, as an abridgement of Cantwell's First Amendment rights, an ordinance restricting his conduct on a public street. Similarly, in *Hague* v.

C.I.O., 307 U.S. 496 (1939), while recognizing that streets and parks are held in trust for the use of the public and that conduct therein is subject to regulation, the Court held that municipal officers were properly enjoined from enforcing ordinances forbidding the distribution of printed matter or holding meetings in streets and parks without a permit. Again in *Schneider* v. *State*, 308 U.S. 147 (1939) the Court ruled "that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." 308 U.S. 162. See also *Lovell* v. *Griffin*, 303 U.S. 444 (1938). And in *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), the Court held that the use of the mails may not be conditioned upon a requirement that operates as a limitation on the unfettered exercise of First Amendment rights. Cf. *Hannegan* v. *Esquire*, 327 U.S. 146 (1946).[10]

There are limitless and dangerous implications in the Commission's argument that since a broadcaster uses a public frequency under a license the Commission may "in the public interest" compel him to comply with the "personal attack" doctrine. The same argument would justify almost any interference by the Commission with programs concerning public affairs; the Commission would be restricted only by its own concept of what constitutes the "public interest"—at least, in the ab-

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[10] See Mr. Justice Harlan, dissenting in *Roth* v. *United States*, 354 U.S. 476, 504, Footnote 5, (1957) "The hoary dogma of *Ex parte Jackson*, 96 U.S. 727 and *Public Clearing House* v. *Coyne*, 194 U.S. 497, that the use of the mails is a privilege on which the government may impose such conditions as it chooses, has long since evaporated." [Citing cases]

sence of litigation. True, the Commission in its letter to the petitioners (A48, 49) stated that

> "* * * Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's 'honesty, character, integrity or like personal qualities.' * * *"

But such a personal attack stands on no different footing, and is entitled to no lesser protection under the First Amendment, than any other speech. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Near* v. *Minnesota*, 283 U.S. 697 (1931); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); cf. *Winters* v. *New York*, 333 U.S. 507, 510 (1948).[11] The Commission's attempt to justify its "personal attack" doctrine as a modest and reasonable intrusion upon First Amendment rights, applying only to certain "personal attacks", is a striking illustration of the danger of opening the door barring the abridgement of free speech.

In any event, the Commission has completely failed to demonstrate that there is any overriding or compelling public interest which requires the imposition of restraints or sanctions upon radio broadcasts of personal attacks. That the Commission believes such ac-

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[11] "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." (333 U.S. 510) Cf. also Mr. Justice Douglas dissenting in *United States* v. *International Union*, 352 U.S. 567, 597, "First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy."

tion desirable and in the public interest is of course not conclusive. No doubt the legislatures or municipal authorities believed it was desirable and in the public interest to enact the statutes or regulations which this Court struck down in *Bates* v. *Little Rock,* 361 U.S. 516 (1960); *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Talley* v. *California,* 362 U.S. 60 (1960); and *Mills* v. *Alabama,* 384 U.S. 214 (1966). This Court, however, was constrained to disagree.

In its letter to the petitioners (A49) and in the Court below the Commission relied upon language found in *National Broadcasting Company* v. *United States,* 319 U.S. 190, 226, 227 (1943). There, Mr. Justice Frankfurter wrote:

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."

Earlier in the same opinion Mr. Justice Frankfurter stated:

> "But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply." 319 U.S. 215, 216.

We submit, however, that these statements must be read in context. The Court in the *National Broadcast-*

ing Company case was considering the validity of the Commission's Chain Broadcasting Regulations. There was no question of any attempt to control the contents of programs or impose any previous condition or restraint upon broadcasts. We submit that Mr. Chafee's analysis of the matter is sound. Referring to Justice Frankfurter's statements, Chafee wrote:

> "Did Justice Frankfurter mean to say that the FCC could control the contents of programs, contrary to what Justice Roberts had said a few years before, as quoted above? Or did he have in mind the character of the persons participating in broadcasting and their methods of competition? The latter sense seems to me more probable and need cause no alarm." (Chafee, Government and Mass Communications, 1947, p. 580)

The statement by Mr. Justice Roberts, to which Mr. Chafee referred, appears in *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 475 (1940), where the Court, speaking through Mr. Justice Roberts, said:

> "But the Act [Communications Act of 1934] does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

It has been contended, and no doubt will be argued by the Commission here, that in some way the fact that the number of available broadcast frequencies is limited makes radio broadcasters subject to regulation curtailing the right of free speech that would not be permissible in the case of newspapers. Although the reasoning is somewhat obscure the argument seems to run that since frequencies are scarce broadcasting facilities must also be scarce, and this being so the Commission

may impose conditions and restraints upon broadcasters, to assure that their programs are "fair", "balanced", diversified, and in the public interest. In the absence of such regulation, it is said, there might not be diversity in the voices heard on the air, and the public might not hear both sides of controversial issues.

The petitioners submit that restrictions on freedom of speech in radio cannot be sustained, whether the number of radio stations be large or small. The First Amendment rights of broadcasters do not wax or wane according to the number of stations on the air.[12] Assuming that the premise of the Commission's argument is accepted would the Commission then have *carte blanche* to control the contents of broadcasts if there were only one radio station, or a dozen, or a hundred? We think not. In any event the Commission's argument is not supported by the facts. There are 6253 commercial radio and television stations in the United States, compared to only 1754 daily newspapers, a ratio of better than 3½ to 1.[13] Given these thousands of outlets for the expression of opinion over the air, it flies in the face of reality to contend that diversity must be enforced by governmental regulation of the type applied to the petitioners. It would indeed be more logical to argue that since the number of daily newspapers is comparatively small and is steadily diminishing the government should take a hand to assure that all spectrums of opinion are represented in the press.

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[12] Cf. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1449; op. cit. supra, note 4.

[13] U.S. Bureau of the Census Statistical Abstract of the United States, 1967 (88th Ed.), Nos. 737, 746.

The Commission's rules and regulations prohibit common ownership or control of more than seven AM, FM and TV stations. *FCC Rules & Regulations*, Secs. 73.35(b), 73.240(a)(2), 73.636(a)(2).

In comparing the situation of radio broadcasting with that of newspapers another factor must be considered. The time available for use by a broadcasting station is limited; if a broadcaster is ordered to carry a particular program he obviously cannot add another fifteen minutes to his broadcasting day, but must make a place for the program by re-arranging his schedule and omitting other material. A newspaper, however, is under no such limitation, but may add columns or pages without difficulty. Yet it will hardly be suggested that because newspapers are comparatively few in number and can without difficulty in terms of space carry responses to personal attacks they may in the public interest be required to publish such a response whenever a personal attack is printed.

It was argued by the Commission in the court below, and held by that court, that the Commission's order to the petitioners was justified by Section 315(a) of the Communications Act of 1934 (47 USC 315(a)) as amended in 1959. (*Supra*, p. 3) The theory of the Commission was that by the amendment of Section 315(a) Congress approved the Commission's "fairness doctrine" and specifically approved the application of that doctrine in the "personal attack" ruling directed against the petitioners. It was also suggested, and the court apparently agreed, (A 128; 381 F. 2d 928) that the "personal attack" rule was authorized by 47 USC 303(g) (*supra*, p. 2), empowering the Commission to "generally encourage the larger and more effective use of radio in the public interest."

We submit that these arguments are unsound. First, as we believe we have demonstrated, if Section 315(a) as amended, or any other statutory provision upon which the Commission may rely, has the effect con-

tended for by the Commission it is to that extent unconstitutional. In the second place, the history of the 1959 amendment to Section 315(a) clearly discloses that it did not authorize and was not intended to authorize the Commission's personal attack doctrine. As we have said, the purpose of the amendment was to overturn the ruling of the Commission in the so-called *Lar Daly* case,[14] that a television station which used a brief news clip of a candidate's activities—without the candidate's prior knowledge or consent—was required to provide equivalent free time to all opposing candidates to use the station as they saw fit. The report on the amendatory legislation by the Senate Committee on Interstate and Foreign Commerce made it plain that the purpose of Congress was to prevent the "blackout in the presentation of legally qualified candidates" that would inevitably result from any such free time requirement. Senate Report No. 562, July 22, 1959, to accompany S2424. There is nothing whatever in the report or in the history of the bill to suggest that while amending the law to prevent one type of blackout by a free time requirement Congress intended to authorize another. Furthermore, the Commission's personal attack doctrine was not articulated until 1962—three years after Congress amended Section 315(a). *Clayton W. Mapoles,* 23 Pike & Fischer, RR 586 (1962); Fairness Primer 29 Fed. Reg. 10415 (1964). The Commission's suggestion that in 1959 Congress was fully aware of the personal attack doctrine is therefore untenable. In this connection it should be noted that in Conference Report No. 1069 on the proposed amendment the managers on behalf of the House stated that the provision of the bill imposing an obligation of fairness

[14] 26 FCC 715.

upon broadcasters was merely "a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." In short, the amendatory legislation conferred no new authority upon the Commission.

CONCLUSION

In conclusion, it is submitted that the order of the Federal Communications Commission directing the petitioners to notify Mr. Cook of the personal attack upon him broadcast over the petitioners' station, to furnish him with a transcript, recording or summary of the broadcast and to grant him free time to respond, is an abridgement of the freedom of speech and of the press guaranteed by the First Amendment. We submit that the Court should enter a judgment holding the order invalid and relieving the petitioners of the obligation to comply.

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